GEW/eap 8/5/2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Verizon Communications Inc. ("Verizon") and MCI, Inc. ("MCI") to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI.	Application 05-04-020 (Filed April 21, 2005)

ADMINISTRATIVE LAW JUDGE'S RULING ADDRESSING MOTION OF QWEST TO COMPEL RESPONSES

1. Summary

This ruling grants in part and denies in part the motion filed on July 28, 2005, by Qwest Communications Corporation (Qwest) to compel responses to two individual data requests to which Verizon Communications Inc. (Verizon) has declined in part to respond. The data requests seek documents relating to Verizon's interstate special access services.

2. Background and Qwest's Position

Qwest in its data request 2-13 asks a lengthy series of questions, it states, "so it could better understand Verizon's practices and future intentions in connection with the provision of special access services, whether sold or purchased out of an intrastate or interstate tariff or arrangement." (Qwest Motion, at 3.) Verizon objected to the data request on grounds that it is overly broad and unduly burdensome and that "it would require Verizon to produce information concerning federal tariffs, offering services within the exclusive jurisdiction of the Federal Communications Commission (FCC), that are neither

relevant to this proceeding nor are likely to lead to the production of admissible evidence." (Verizon Objections, at 16.)

Qwest argues that the data goes to its contention that the ability of MCI, Inc. (MCI) and AT&T Communications of California, Inc. (AT&T) to provide competitive facilities-based special access alternatives, together with their role as the highest volume purchases of special access, encourages Verizon to offer MCI and AT&T discounts on such services. According to Qwest, these discounts benefit carriers such as Qwest because they must be tariffed and made available to all. If MCI is merged into Verizon, and AT&T is merged into SBC Communications Inc. (SBC), Qwest contends that Verizon and SBC then can increase intrastate and interstate special access rates and force out competition.

Qwest also asks that the Commission compel a response to its data request 1-17, which seeks detailed information and a map for each Verizon wire center in California for every competitive local exchange carrier (CLEC) other than MCI separately. According to Qwest, Verizon has refused to supply information from a vendor, GeoTel, responsive to request 1-17 because that information is proprietary. Qwest states that it was told it would have to seek (or purchase) that information directly from GeoTel. At the same time, Qwest states, Verizon stated that it would not "unmask" the identities of carriers for which information responsive to the data request had been provided, again because that information is proprietary. According to Qwest, Verizon could provide those identities with the permission of the carriers, but Verizon has not sought such permission.

3. Response of Verizon

Verizon on August 2, 2005, responded to the motion to compel, arguing that, apart from the jurisdictional issue, data request 2-13 is hopelessly overbroad. Verizon states:

> This *particular* request…seeks "*all* correspondence, memoranda, proposals, bids or other written documents" between Verizon and MCI, AT&T or "*any other carrier*" that "in any way" relate to the terms and conditions of 21 distinct plans in the relevant tariffs, as well as all prior iterations of such plans and "*all* documents" that relate to Verizon's "internal decisionmaking" concerning each rate, term and condition of all iterations of such plans. (Verizon response, at 1, quoting Cox Motion, Attachment A (emphasis added).)

Verizon argues that data request 2-13 calls not only for the entire history of Verizon's special access tariffs, but all correspondence with any carrier that "in any way" relates to each term and condition of special access service, as well as all documents relating to Verizon's development of the terms and conditions of such service. But that is not all, Verizon comments. The second half of the request, equally as long as the first half, goes on to demand the identical set of documentation for "each former version of the plan" without a time limitation. According to Verizon, there are 21 separate special access term plans currently found in Verizon's FCC tariffs that can be purchased in California (FCC Tariff Nos. 14 and 16). These tariffs were initially filed by predecessor companies GTE or Contel shortly after the AT&T divestiture proceeding in the mid-1980s. Thus, Verizon states, to fully respond to the data request, Verizon would have to identify each iteration of every term, condition or rate in the 20-year history of these tariffs.

As to data request 1-17, Verizon states that it has responded to this request by producing the CLEC information in its possession but in a "coded" form to protect the identities of the CLECs and to prevent disclosure of the CLECs' facilities and collocation arrangements to a competitor. Verizon states that this is a complete response to the data request, adding:

> Qwest did not even request the "unmasked" information that it now seeks. Qwest's data request 1-17 expressly states, "[i]n identifying CLECs separately, *please assign a numeric or coded designation to each CLEC instead of its name.*" Attachment B, p. 13 (emphasis added). This is precisely what Verizon has done. Having received the data in the form it requested, Qwest cannot now be heard to complain that Verizon's response is insufficient. Moreover, the fact that Qwest expressly requested coded data undermines its belated claim that such coded data is "of limited value" or somehow impairs its ability to prepare its case (Motion at 9). If the identities of the CLECs were so critical to Qwest's ability to prepare its testimony, as it now claims, Qwest presumably would have asked for them in the first instance. (Verizon Response, at 6.)

As to Qwest's proposal to require Verizon to seek permission from CLECs to disclose this information, citing particularly a need for AT&T's proprietary information, Verizon states that it already has sought AT&T's permission to release certain AT&T proprietary data. Although AT&T consented to releasing such data to The Utility Reform Network, it refused to consent to the release of the data to intervenors that are also competitors of AT&T.

Verizon also responds that Qwest already has the GeoTel data it seeks. Verizon states that it has licensed data from GeoTel under a contract that prohibits Verizon from sharing the data with third parties without GeoTel's consent. Upon inquiry from Verizon's counsel, GeoTel stated that Qwest itself is a customer of GeoTel and has purchased the same data from GeoTel. In fact, Verizon states, Qwest's licensed data is more up-to-date than Verizon's.

According to Verizon, there is no need for an order requiring Verizon to produce data that is equally available to Qwest.

4. Discussion

Verizon's objection to data request 2-13 on jurisdictional grounds lacks merit. The primary concern appears to be that the data request seeks information on Verizon's interstate special access plans, which ordinarily are subject to regulation by the FCC, not by this Commission. While this contention may have merit in a ratesetting case, it takes too narrow a view in terms of permitted discovery.

This Commission has made it clear that, in evaluating a proposed merger, the Commission can consider issues typically outside of its jurisdiction to the extent they affect California ratepayers. For example, in *Re SCEcorp* (1991) 122 P.U.R.4th 225, this Commission rejected a proposed merger between two energy companies and, in doing so, held that it had the authority to "take into account certain issues regarding interstate transmission and bulk sales" despite the fact that such sales are subject to federal oversight. In making this determination, the Commission relied on cases decided by the California Supreme Court that held that the Commission's failure to receive and consider evidence regarding the impact of proposed Commission action on intrastate, interstate and international economic activity rendered decisions made by the Commission null and void.

In *U.S. Steel Corp. v. PUC* (1981) 29 Cal.3d 603, the Court annulled a Commission decision for failure to consider the relative market share of domestic *and foreign* steel producers when deciding whether to exempt private-vessel commodities from motor carrier minimum rate regulation. In *Northern California Power Agency v. PUC* (1971) 5 Cal.3d 370, the Court annulled a Commission decision for failure to consider *federal* antitrust implications when evaluating

whether to issue a certificate of public convenience and necessity to an electric company.

More recently, in the SBC / AT&T merger proceeding (Application 05-02-027), Administrative Law Judge (ALJ) Pulsifer on July 27, 2005 acknowledged that "[t]he Commission has previously confirmed its jurisdiction to consider competitive impacts and mitigating measures for a merger under Section 854(b), even where a federally regulated service is involved."[1] Judge Pulsifer added:

> The objections raised by the Joint Applicants are similar to those raised by Edison in [the proposed merger with San Diego Gas & Electric Company, Decision (D.) 91-05-028]. Although the Edison merger involved a different industry, the issue still involved the jurisdiction of this Commission to impose conditions on a merger that relate to federally regulated services. Consistent with the Commission's determination, as cited above from D.91-05-028, the statutory mandates under § 854(b)(2) require consideration of the full extent of competitive impacts of the merger, including impacts on services and prices that may involve federal regulation. (ALJ Ruling, July 27, 2005, at 7.)

On the other hand, there is merit in Verizon's objection to data request 2-13 on grounds that it is overbroad and burdensome. While the parties met and conferred, they obviously did not reach the question of whether the data request could be narrowed. Accordingly, this ruling requires the parties to meet and confer on whether the documents sought in data request 2-13 can be limited to those since a date certain (i.e., July 1, 2003) and limited to those "speaking

[1] ALJ Ruling Denying, in Part, Applicants' Motion to Strike Reply Testimony of Various Witnesses, July 27, 2005, at 6.

documents" on a limited and specified number of topics that involve communications to and from employees with decision-making authority in tariff matters. Additionally, the parties should consider limiting data production to some but not all of the 21 tariffed plans. This ruling requires Verizon to respond to data request 2-13 provided Qwest first agrees to substantially narrow the documents requested either along lines suggested here or otherwise acceptable to the parties.

As to data request 1-17, Verizon apparently has already contacted GeoTel and AT&T seeking their consent to the release of proprietary data. Those requests for consent have been denied. Since the requested relief (requiring Verizon to seek the consent of GeoTel and AT&T) has already been met, there is no need for a further order by this Commission as to those entities. To the extent Verizon obtains the consent of a vendor or a carrier to release protected data under appropriate protective order, Verizon shall produce those documents responsive to the data request to the extent such documents now exist and are in Verizon's possession. Under this ruling, Verizon is not required to create new documents responsive to the data request.

This ruling takes note of the fact that Qwest itself has sought permission from a vendor and from other carriers to disclose proprietary data to Verizon and MCI in Qwest's responses to certain data requests in this proceeding. To the extent it has not already done so, Verizon is directed to take similar steps with respect to carriers that have protected data that Verizon has not produced.

This ruling denies Qwest's request that Verizon be required to "unmask" the identities of CLECs identified by code in its responses. Since Qwest in its original data request asked that CLEC identities be masked by code, and since

Verizon complied, further discovery beyond that should not be made in a motion to compel something that had not previously been requested.

IT IS RULED that:

1. The Motion of Qwest Communications Corporation to Compel Responses From Verizon is granted in part and denied in part.

2. Parties shall promptly meet and confer as necessary to determine whether data request 2-13 can be narrowed and to discuss the degree of confidentiality, if any, to be accorded documents and data produced in response to data requests 2-13 and 1-17.

3. Verizon Communications Inc. (Verizon) shall produce relevant documents that are responsive to Qwest's data requests 2-13 and 1-17, subject to the conditions set forth below.

4. Verizon need not produce documents responsive to data request 2-13 unless Qwest agrees to a limitation on time period and a substantial narrowing of required data along lines suggested in this ruling.

5. To the extent it has not already done so, Verizon shall make a good faith effort to obtain the consent of carriers to production of documents responsive to data request 1-17.

6. Neither Verizon nor its vendor is required to produce new documentation in responding to data request 1-17.

7. Qwest's request that Verizon be order to "unmask" competitive local exchange carriers identified by code in Verizon's response to data request 1-17 is denied.

8. Verizon's production of documents in response to Qwest's data requests 2-13 and 1-17 shall be made within three business days of the date of this order, unless otherwise mutually agreed by the parties.

Dated August 5, 2005, at San Francisco, California.

/ s / GLEN WALKER
Glen Walker
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Addressing Motion of Qwest to Compel Responses on all parties of record in this proceeding or their attorneys of record.

Dated August 5, 2005, at San Francisco, California.

/s/ ERLINDA PULMANO
Erlinda Pulmano

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.